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IN THE

# Supreme Court of the United States

**October Term, 1980**

MOHINDER SINGH, SHAMSHER WADUD, BENGAL CABARET, INC., D/B/A NIRVANA RESTAURANT, AND BANGLADESH HOUSE, INC., D/B/A NIRVANA BOUTIQUE,
*Petitioners,*

-against-

UNITED STATES OF AMERICA,
*Respondent.*

## JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. (a) Were the petitioners' Sixth Amendment rights to meet and confront witnesses destroyed because the District Court allowed the Government, over objection of defense counsel, to introduce into evidence a civil judgment obtained by a key prosecution witness (Miron) against the defendant Wadud on the very issue that was critical to the conviction of the defendants at their criminal trial?

(b) Were the petitioners denied their elemental right to the presumption of innocence by the admission into evidence by the Government, at the outset of the case and over objection of defense counsel, the fact that a key prosecution witness (Miron) had obtained a civil judgment against the defendant Wadud on the very issue that was critical to the conviction of the defendants at their criminal trial?

2. (a) Were the petitioners' Fifth Amendment rights to due process violated by the suppression of exculpatory material negating the credibility of the other key Government witness (Franklyn Abrams, Esq.)?

(b) Were the petitioners' Fifth Amendment rights to due process violated by the curtailment of cross-examination of the other key Government witness (Franklyn Abrams, Esq.) concerning this witness' being the target of a Federal investigation concerning fraudulent labor certifications, unrelated to the defendants' indictment, which was the very issue that was the subject of Abrams' testimony against the defendants?

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*Petitioners,*

-against-

UNITED STATES OF AMERICA,
*Respondent.*

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Mohinder Singh, Shamsher Wadud, Bengal Cabaret, Inc., d/b/a Nirvana Restaurant, and Bangladesh House, Inc., d/b/a Nirvana Boutique, jointly pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

## Opinions Below

Following the entry of the judgments in the District Court, petitioners appealed to the Court of Appeals. The as yet unreported opinion of the Court of Appeals may be found in the joint appendix filed with this petition (1a - 19a).[1]

Upon the affirmance by the Court of Appeals of all judgments of conviction, petitioners jointly petitioned the Panel of the Court of Appeals which affirmed their convictions for rehearing and suggestion for rehearing en banc. By order dated August 1, 1980, all applications were denied (20a - 21a).

The petitioner Mohinder Singh was sentenced to a term of probation for two years.

The petitioner Shamsher Wadud is presently incarcerated and serving his sentence of fifteen (15) months imposed on each of the six counts to run concurrently with each other.

The petitioner Bengal Cabaret, Inc. was fined ten thousand ($10,000.00) dollars on the conspiracy count.

The petitioner Bangladesh House, Inc. was fined two thousand ($2,000.00) dollars on the conspiracy count.

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[1]The following abbreviations are used in this petition: "a" is a reference to petitioners' joint appendix, which is filed with this petition. The appendix also contains the decision of the United States Court of Appeals for the Second Circuit dated June 12, 1980; the order of the United States Court of Appeals for the Second Circuit dated August 1, 1980 denying rehearing; and the relevant statutory provisions involved. "A" is a reference to the 2-volume appendix heretofore submitted to the United States Court of Appeals for the Second Circuit. These volumes, which contain, *inter alia*, trial testimony, will be certified to this Court.

## Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was June 12, 1980. The judgment of the Court of Appeals for the Second Circuit was entered on June 16, 1980. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 1, 1980. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1) and Rule 20 of the United States Supreme Court Rules.

## Constitutional and Statutory Provisions Invoked in the Case

1. The Fifth Amendment to the Constitution of the United States.

2. The Sixth Amendment to the Constitution of the United States.

3. Title 28 U.S.C. § 1254(1).

These constitutional and statutory provisions are set forth in petitioners' joint appendix at 22a - 23a.

## Statement of the Case

### A. The Indictment: The Government's Theory of the Case

This prosecution commenced on July 16, 1979 with the filing of Indictment Nos. 79-1439, 79-1440, 79-1484, 79-1485 in the United States District Court for the Southern District of New York (A. 7-18). In substance, Count I of the prolix indictment charged the petitioners and others with conspiring to violate the Immigration Laws (Title 18, United States Code, Section 371). The indictment alleged that the conspiracy was manifested through a scheme in which the principal defendant, Shamsher Wadud (hereinafter referred to as "Wadud"), through the vehicle of his corporations, Bengal Cabaret, Inc., d/b/a Nirvana Restaurant and Bangladesh House, Inc., d/b/a Nirvana

Boutique, assisted aliens needing "green cards" by means of the submission of fraudulent labor certifications to the Immigration and Naturalization Service (hereinafter referred to as "INS").

The petitioner Mohinder Singh (hereinafter referred to as "Singh") was alleged in the conspiracy count to have assisted Wadud in locating aliens in need of this service. In point of fact, Singh's involvement, in terms of proof, was concerned with assistance rendered by Wadud, at the behest of Singh, for Singh's brother, Sarbjit Singh. Sarbjit Singh was originally named as a defendant and charged in the third count of the indictment (A. 16). During the early course of the trial, Sarbjit Singh was severed and thereafter received a *nolle prosequi.*

It should also be observed in the context of the indictment that the sixth count of the indictment charged Ahsan Ullah as a defendant in that "Ahsan Ullah, aided and abetted by the defendant Bengal Cabaret, Inc., doing business as the Nirvana Restaurant, and the defendant Shamsher Wadud" obtained an "immigrant visa" allowing him "entry into the United States" by means of a fraudulent labor certification submitted by Ahsan Ullah and Wadud to INS that showed Ahsan Ullah to have obtained employment by Wadud at Nirvana as the manager (A 17). Ahsan Ullah was found not guilty (A. 2014), although Wadud and his corporation Bengal Cabaret, Inc., d/b/a Nirvana Restaurant were found guilty (A. 2015). Realizing the inconsistency of this verdict, the trial court, with the consent of the Government, dismissed the verdict of guilty "as to Count 6 as to Mr. Wadud and Bengal Cabaret" (A. 2018).

It was the Government's theory that the petitioner Wadud, somehow aided and abetted by petitioner Singh and others with whom Wadud had also conspired and agreed, assisted aliens, by means of fraud, in obtaining "green cards" whereby these aliens would be allowed to remain in the United States. The

fraud involved the submission to INS of false labor certifications wherein Wadud, as the alleged prospective employer and principally as the owner of the Nirvana Restaurant, represented to INS that he was hiring these aliens as "specialty cooks." This alleged fraudulent representation to INS was contained in Part B of the labor certification forms submitted in conjunction with Part A, filled out by the prospective employee.

The essence of the Government's case was that these alleged criminal acts of Wadud were performed in exchange for the services of the aliens at the restaurant with little or no compensation or for payment of monies.

Crucial to the prosecution's theory and without which a conviction could not be rendered against the petitioners was the testimony of Saleh Nizamuddowlah [Miron] (A. 310-471) and Franklyn Abrams, Esq. (A. 941-1026).

Miron was the first witness called by the Government who testified to the charges in the indictment. The significant aspect to Miron's testimony was that Wadud had assisted Miron to enter the United States from Bangladesh through fraudulent means; that Wadsud misrepresented to Miron that he would make Miron manager of the Nirvana Restaurant; that after Miron came to the United States Wadud subjugated him to the extent of Miron's being obligated to work at Nirvana without salary and even to sleep at the Restaurant.

Abrams was the vehicle whereby evidence not previously admitted against Singh was introduced into evidence (A. 967). Moreover, Abrams, as an immigration attorney, testified to the allegedly fraudulent labor certifications submitted to INS by Wadud through the unknowing Abrams who was representing the prospective employees (A. 943-946).

## B. The Proof At Trial

### (a) The Prosecution's Case.

Sometime in late August or early September, 1972, Wadud returned to his native country Bangladesh where, according to the testimony of Miron, they met at the home of Wadud's mother. Miron, according to his own testimony, had arranged to meet Wadud through Wadud's brother-in-law, Huq Rabuil Mani Sheikh (hereinafter referred to as "Mani") with the purpose of obtaining Wadud's aid to come to the United States (A. 311).

Miron claimed, on direct testimony, that Wadud guided him by fraudulent means to obtain the necessary papers to leave Bangladesh and come to the United States (A. 311-319). According to Miron, following his arrival in the United States, he was obligated, at Wadud's insistence, to work as a waiter at Nirvana for almost two years without salary (A. 328) and even to sleep at the restaurant (A. 328).

Miron further testified that when he asked Wadud about the "green card" he needed for permanent residence, Wadud said he would sponsor Miron as a specialty cook. Since Miron knew this to be improper he allegedly refused to do this (A. 322-324).

According to Miron, while he was forced to sleep at the restaurant by Wadud, Miron spoke with Singh, who was not a specialty cook as claimed by Singh to INS, but a dishwasher, and furthermore Singh told Miron that he, Singh, was paying Wadud to sponsor him for his "green card" (A. 336, 441, 432).

Finally, at the conclusion of Miron's direct testimony, the Government elicited the fact that Miron had obtained a civil judgment against Wadud after trial as a result of Wadud's non-payment of wages. This key testimony was obtained over objection of defense counsel (A. 336-337).

On cross-examination, numerous inconsistencies in Miron's testimony were brought out despite curtailment by the trial court (A. 338-453).

In view of the Government's introduction of the aforementioned civil judgment, defense counsel moved for a mistrial, which was denied (A. 665-666).

Following the testimony of Miron, the Government called a number of illegal aliens who allegedly worked for Wadud at Nirvana without pay. These witnesses, who were "friends" of or "friendly" with Miron, supported Miron's hardship tale. On cross-examination, nearly all these witnesses were shown to be acting in cooperation with INS against Wadud which allowed them to remain in the United States.

The second most important prosecution witness was Franklyn Abrams, Esq., an immigration lawyer who represented eight aliens who were sponsored for labor certification by Wadud as specialty cooks during the period covered by the indictment (A. 943-944). According to Abrams, he generally received the requisite employer information from Wadud over the telephone, although he sometimes copied this information from previous forms (A. 946). Abrams further testified on direct examination that Singh sometimes accompanied these aliens to Abrams' office (A. 951-952). It was Abrams who provided the Government with a basis for claiming that Wadud submitted false information to INS in the labor certifications as part of a scheme (A. 947).

On cross-examination, numerous inconsistencies in Abrams' testimony were developed. Of particular note is that Abrams was surprised to find that he could only find one form with his notations (A. 1005).

Of most consequence is the fact that defense counsel learned of an ex parte conference between the Government and the trial court (A. 399-401) regarding Abrams' credibility arising from the fact that Abrams had been the subject of an investigation by INS which

was based on Abrams' submission of false labor certifications (*unrelated* to the case on trial). This conference was not disclosed to defense counsel by either the prosecution or the trial court but resulted from defense counsel's reading of the daily copy of the minutes. Moreover, on cross-examination the defense was allowed to ask *only two* questions regarding Abrams being the subject of such investigation by order of the trial court (A. 972-973).

Material relating to Abrams having been the subject of the aforementioned investigation was submitted to the trial court *in camera* by the Government whereupon the trial court aborted defense counsel's argument as to how such material would come within *Brady v. Maryland* (A. 843, 852, 853).

Other witnesses called by the Government testified either directly or indirectly to the charges but Miron and Abrams were the nucleus about which all else revolved.

### C. The Petitioners' Case

Various witnesses testified for the defense on elements that were a necessary part of the Government's burden of proof. Thus, Karim Chand (A. 1237-1253), an absolutely impartial witness, expressly contradicted the testimony of Dr. Naik, a Government witness, whose testimony was needed to establish proof of the conspiracy (Count I) and the fraud alleged in Count II. Moreover, Karim Chand's testimony was supported by that of Steven Elias, Esq. (A. 1317-1320).

Additional witnesses for the defense testified that Singh had indeed been employed at Nirvana as a specialty cook, in contradiction to Miron's testimony (A. 1283, 1288-1289; A. 1663, 1691, 1694) and had the requisite background for sponsorship by Wadud (A. 1659-1660).

Wadud testified on his own behalf and denied the accusations (A. 1401-1466) of the indictment. Wadud's testimony expressly contradicted that of Miron and Abrams, the key prosecution witnesses.

A number of character witnesses also testified on behalf of both Wadud and Singh.

## Reasons for Granting the Writ

This petition raises pressing and substantial questions concerning the denial of petitioners' Fifth Amendment Rights highlighted by the holding of an undisclosed ex parte conference between the Government and the trial court following commencement of trial, the subject matter of which involved the suppression of exculpatory material.

In addition thereto, this case involves petitioners' being denied their Sixth Amendment Rights by introduction of a civil judgment to establish the truthfulness of the key Government witness and presents a conflict between the decision of the Second Circuit in affirming petitioners' conviction and the holding of the Seventh Circuit in *United States v. Konovsky*, 202 F.2d 721 (7th Cir. 1953).

## ARGUMENT

### POINT I

### The Trial Court Erred by Allowing the Government, Over Objection of Defense Counsel, to Introduce into Evidence a Civil Judgment Obtained by a Key Prosecution Witness [Miron] Against the Defendant Wadud on the Very Issue That Was Critical to the Conviction of the Defendants at Their Criminal Trial

At the very outset, it is of paramount significance to note that at a pre-trial conference with Judge Carter on September 18, 1979 (only six days before the com-

mencement of the trial and the introduction of the civil judgment by the Government), the problem resulting from the fact that there had been numerous litigations involving "various *key* government witnesses and the defendants" (A. 28) was raised and discussed. Defense counsel stated to the Court that this was "certainly going to be relevant in terms of cross-examination" (A. 28). Judge Carter promptly stated that any excursion into this area would be narrowly circumscribed. Defense counsel readily accepted this instruction and noted its acceptance of the Court's restriction on the record (A. 28):

> THE COURT: ...the point is the fact of their being on opposite sides of one another and involved in litigation may be relevant, but certainly *the issues that are involved in the case and any ... inquiry concerning the case is not.* (Emphasis added.)
>
> MR. KULSCAR (sic): I agree.
>
> (See also continuing colloquy at A. 28-29).

On the very first day of trial the Government called Miron as a witness. Miron was one of two key witnesses for the prosecution – the other being Franklyn Abrams, Esq. (see Point II). Miron was a critical witness in establishing the theory of the Government's case and proving the fundamental legal and factual elements of the conspiracy count which, as stated by the Government in its opening, was that the defendants Wadud, Singh and others "located aliens in need of green cards but unable to get them legally and brought these aliens to ... Wadud (A. 66) [who] aided by Mohinder Singh, manipulated these illegal aliens ... certain of [whom] were compelled to live in the restaurant ... [and] forced to work long hours for ... no salary" (A. 62-63). Miron's direct testimony was a mirror image of the Government's claims in its opening. Miron stated that he had been introduced in Bangladesh to Wadud who made false promises to him that he would become a manager of Nirvana, that

Wadud assisted him to come to the United States by illegal means, that Miron was then compelled by Wadud to work as a waiter in the restaurant without pay and to sleep there. Miron gained his green card finally by marrying an American.

Needless to say, Miron's credibility was essential to the Government's efforts to convict Wadud and with that in mind the Government concluded its direct examination of Miron by eliciting from Miron the fact that he had (1) sued Wadud for nonpayment of wages and (2) that he had won the case. This was done over objection of defense counsel and in contravention of what defense counsel understood to be the ground rules established by the Court at the pretrial conference (A. 26-51). The very next day (the second day of trial) defense counsel, realizing that no instruction could cure the damage done by introduction of the civil judgment obtained by Miron against Wadud on the key issues in the criminal case, and that the only purpose such information was elicited by the prosecution was to buttress Miron's truthfulness and credibility by grossly improper means, moved for a mistrial under *United States v. Konovsky, supra.* The motion was denied. Despite the many inconsistencies brought out in Miron's cross-examination, there was no way to avoid the impact that Miron's truthfulness had already been favorably adjudicated on the key issues to the criminal case. Finally, the Court's instruction did not serve to cure the defect but, if anything, enhanced it.

> The result of this case that I have just mentioned ... cannot enter into your determination ... [Y]ou may only consider the *result* of that case ... in terms of assessing [Miron's] credibility (A. 2000). (Emphasis added.)

The Government's contention on appeal that the introduction of the fact that Miron *won* a civil case against Wadud *for non-payment of wages* at the conclusion of its direct case was done "to avoid an inference

that the Government was trying to hide the witness' personal bias and self-interest ..." (Government brief on appeal, p. 31) is sheer hypocricy. Clearly, the Government could validly elicit from Miron that he sued Wadud and perhaps even the fact that the matter was disposed of. This, however, is a far cry from introducing the fact that the civil action involved nonpayment of wages and that Miron won the case and that the amount awarded was $10,000. The introduction of these specific facts by the Government was not done as a means of showing possible "personal bias" or "self-interest" but rather to establish for the trial jury that Miron's truthfulness had already been proven in a civil action wherein Miron had obtained a judgment against Wadud involving the same issues as his testimony at the criminal trial.

The actions of the Government in eliciting the *specific* responses it did from Miron over objection of defense counsel, who immediately expressed to the Court in a motion for mistrial the irreparable damage done to the defense case, was violative of the foundation of the criminal justice system -- the presumption of innocence and one of its cornerstones -- the Sixth Amendment right of confrontation.

As stated by the Supreme Court in *Taylor v. Kentucky*, 436 U.S. 478 (1978):

> This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined *solely on the basis of the evidence adduced at trial* ... (Emphasis added.)

In recognizing the importance of this basic tenet as expressed by this Court in *Taylor v. Kentucky, id.*, and the Sixth Amendment guarantee, the Seventh Circuit in *United States v. Konovsky, supra*, condemned the very act committed by the Government at petitioners' trial when it introduced the result of the civil judgment obtained by Miron. In *Konovsky*, the Government introduced into evidence at the criminal

trial of a number of defendants (over the objection of the defense) a temporary injunction that had previously been obtained against one of the defendants which judgment related to issues that were involved in the criminal prosecution. The *Konovsky* court reversed the convictions obtained against the defendants because of the introduction of the evidence of the prior civil proceeding, stating at 727:

> ... though the jury was instructed that the decree was not received as evidence of guilt we know from common experience that a jury would probably be inclined to follow the court's finding against the defendants in the civil action and thus prejudice the criminal trial ... We see no escape from the conclusion that the inevitable effect of the introduction of the civil judgment in evidence was to lead the jury in the trial of this criminal case to believe that the same issues had already been determined in the civil action. In our opinion nothing could be more prejudicial to a fair trial ... What we have said in this respect is applicable to all defendants. Error is even more clearly apparent as to defendants Brani and Lange. They were not even parties to the civil suit.[2]

In the context of the argument *herein* raised, it must be stated that the opinion of the Second Circuit in affirming the conviction of petitioners accepts without discussion the baseless premise of the Government that introduction of the civil judgment was proper since the judgment was unpaid. Petitioners would emphasize once more that if the Government had simply elicited from Miron that he had sued Wadud on a civil matter as a result of which some money was due Miron, the gravamen of the error here complained of would have been mitigated. The Government was not content to do this but specifically elicited

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[2]Note, in this context, the fact that the co-petitioner of Wadud, Mohinder Singh, was not even a defendant in the Miron civil lawsuit.

from Miron that (1) Miron sued Wadud for *nonpayment of wages*, (2) he won the suit, and (3) the judgment was for $10,000 (obviously demonstrating that Miron had worked without pay for a considerable period as he stated on direct testimony ) -- all of which were essential elements of the criminal charges for which Wadud was on trial and formed the basis of the Government's case.

The actions of the Government deprived the petitioners of their constitutional right to a trial unfettered by the predetermination of their guilt resulting from the impermissible and constitutionally violative introduction of the *issues* and *outcome* of the prior civil proceeding.

## POINT II

**The Petitioners' Fifth Amendment Rights to Due Process Were Violated by the Suppression of Exculpatory Material Negating the Credibility of the Other Key Government Witness [Franklyn Abrams, Esq.] and the Concomitant Curtailment of Cross-Examination of the Witness Concerning His Being the Target of a Federal Investigation Which Was the Subject Matter of the Suppressed Material**

Franklyn Abrams, Esq., an immigration attorney, was the other cornerstone necessary for the case which the prosecution constructed against the petitioners. Abrams, alone, provided the basis upon which the trial court allowed into evidence against the petitioner Singh numerous documents that had prior thereto only been admitted against the petitioner Wadud (A. 967). Moreover, the testimony of Abrams was the keystone upon which the Government relied in responding to the Rule 29 motion made on behalf of the petitioner Singh at the close of the Government's case (A. 1212-1213) and by the trial court in denying the motion (A. 1230). Abrams was clearly a most important

witness against Wadud since Abrams was the attorney who handled many of the labor certifications that were contained in and referred to in the indictment.

Abrams' direct testimony was that he obtained from Wadud by telephone key information contained in the labor certifications. This information, the Government argued, was purposely falsified by Wadud as the means of attaining the objects of the conspiracy (A. 947). However, on cross-examination, Abrams was able to produce *only one* form that contained his notations (A. 1005). Since Abrams' testimony concerning the fact that the false information on the labor certification forms he handled could not be corroborated by the documentary evidence Abrams, on direct examination, claimed to possess, his believability as such was of the utmost significance. Realizing the importance of Abrams to their whole case and the tenuous position that this key witness was in, the Government deliberately suppressed critical exculpatory evidence which would destroy Abrams' credibility -- the fact that he was the target of an investigation by INS involving fraudulent labor certifications having nothing to do with Wadud, and that INS had recommended prosecution to the U.S. Attorney's Office in Newark.

The information and material relating to the nature of the alleged fraud, the basis upon which INS sought criminal prosecution, the findings of the U.S. Attorney's Office and the basis upon which prosecution was declined, was not revealed to defense counsel prior to the trial despite a *Brady* request, nor subsequent thereto when the matter was inadvertently revealed during the trial. To date, it is still unknown whether this *specific* material WAS EVER SUBMITTED *IN CAMERA* to either the trial court or the Second Circuit Court of Appeals.

After deliberately suppressing even the fact of the investigation from defense counsel prior to trial, the Government, after trial had commenced, obtained

an ex parte conference at which the trial court was told that Abrams had been a target of federal criminal investigation which the Government did not intend to disclose to defense counsel (A. 399-401).

When the trial court expressed concern over the ex parte nature of this disclosure and that to continue it further "is going to raise questions which need not be raised" (A. 398), the Government responded artfully that "I just didn't think it was a matter that we need to take everyone's time with ..." (A. 398), and more candidly moments later when A.U.S.A. Groban said (referring to Abrams being a target of the criminal investigation) that "[w]e did not intend to disclose that to the other side. We think it will affect Mr. Abrams' reputation ..." (A. 401).

The deception practiced on defense counsel continued the following day when the Government offered the Abrams files, discussed at the ex parte conference, in open court to the trial judge for *in camera* inspection without either the court or the Government informing defense counsel of the prior ex parte meeting (A. 842-843). Moreover, at the time the offer was made, defense counsel was not even informed what the material being proffered for *in camera* inspection referred to. Finally, defense counsel was not even told of the fact that Abrams had been a subject of a federal criminal investigation concerning falsification of labor certifications -- THE VERY SUBJECT OF HIS TESTIMONY FOR THE GOVERNMENT AGAINST WADUD AND SINGH. It was *only* because defense counsel had ordered daily copy that disclosure of the investigation and the ex parte conference came about.

In compounding this constitutionally violative conduct, defense counsel was allowed by order of the trial court to ask *only two* questions concerning the investigation (A. 972-973). The Government was then permitted on re-direct to elicit that the investigation had been "terminated" (A. 999). When defense counsel sought to explain that the reasons that the

files turned over to the trial court *in camera* are *Brady* material in the sense of impeachment material (A. 843, 852, 853), the trial court refused to allow the argument to be made (A. 853):

> MR. KULCSAR: Excuse me, your Honor, I would like to make my record.
>
> THE COURT: You made your record last night. If I am incorrect that there is 3500 material there, it is preserved for the Court of Appeals.
>
> MR. KULCSAR: I don't want to go to the Court of Appeals, I would like to get a verdict here.
>
> THE COURT: I am weary of all these needless speeches because your record is protected in regard to that. If I am in error, your error is protected.
>
> Now I don't want to hear any further speeches about that at all. I really don't.

That statement of the Second Circuit, at page 12 of its decision (14a) that "the matters contained within the files were ... unconnected with the matter at hand" begs the question. Obviously, these Abrams files are unrelated to the indictment of petitioners but it is also obvious that they are a source of important impeachment material. Of paramount concern to petitioners is the fact that other material still has not been submitted for *in camera* inspection or made known to defense counsel because of which key questions remain unanswered: (1) What was the basis for the belief of INS that a crime had been committed by Abrams?; (2) Why did INS believe that sufficient evidence had been developed to refer the matter to the U.S. Attorney for prosecution?; and (3) Why was prosecution declined? The investigative files themselves cannot provide this information.

The statement of the Second Circuit at p. 11 that "[t]he trial court's ruling that the files contained neither *Brady* nor § 3500 material cannot be overturned on appeal absent a clear showing of abuse

of discretion" (14a), citing *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir. 1974), is only partially accurate. The *Pacelli* standard *only* applies to § 3500, *not Brady*.

Opinions of the Second Circuit in the area of governmental suppression of exculpatory material (including material that defense counsel could use to attack the credibility of Government witnesses) have long condemned such conduct. Cases such as *United States v. Zborowski*, 271 F.2d 661 (2d Cir. 1961); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961); and *Kyle v. United States*, 297 F.2d 507 (2d Cir. 1961) were harbingers of this Court's landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963). This Court's repudiation and criticism of governmental suppression of exculpatory material has most recently found expression in *United States v. Agurs*, 427 U.S. 97 (1976), wherein this Court again emphasized its "overriding concern with the justice of finding guilt." *Id.* at 311.

In *United States v. Morrell*, 524 F.2d 550 (2d Cir. 1975), the Second Circuit remanded the matter for purposes of holding an evidentiary hearing to determine whether the prosecution's failure to disclose a confidential file bearing on the credibility of the government's key witness and which could have been used by defense counsel in cross-examination was deliberate or negligent. In a strongly worded concurring opinion, Judge Friendly opined that the time had come to take stronger measures in cases involving the failure of the Government to disclose *Brady* material such as evidence in its possession relating to its key witness; that rather than expending further "scarce judicial resources to determining the consequences of failures to furnish *Brady* material," *id.* at 558, the requirement imposed upon prosecutors should be strictly adhered to and in situations such as that before the Court a new trial should be ordered without the need for an evidentiary hearing. *Id.*, at 557.

> It is high time that United States Attorneys in this circuit took effective means to heed the Chief Justice's admonition in Giglio,[3] *id.*, at 558 ... An appellate court is naturally reluctant to reverse on *Brady* grounds after long trials where guilt seems clear and the value of the withheld material is dubious. But we should never forget Judge Frank's famous remarks about the salutary effect inherent in a reversal and a direction of a new trial, as distinguished from repeated admonitions. *ibid.*

The conduct of the Government in *admittedly* (A. 401) deliberately suppressing the fact that a key witness was the target of a criminal investigation by INS which specifically involved falsification of labor certifications, that enough evidence had been adduced by INS to recommend prosecution to the U.S. Attorney's Office, that prosecution was declined for reasons still unknown, *in and of itself mandates reversal.* However, the conduct of the Government at petitioners' trial transcended even this degree of impropriety by its charade in submitting to the trial court *in camera* (in open court) files relating to the aforesaid investigation (without telling defense counsel the nature of the material being submitted) following the ex parte conference that had been held. In so doing, the Government successfully prevented defense counsel from being able to articulate a position as regards what it might ask the Court to look for during the *in camera* inspection. Then, after the ex parte conference inadvertently came to light, the trial court foreclosed defense counsel from demonstrating to the trial court how the material submitted *in camera* would be important for cross-examination and finally curtailed any meaningful cross-examination even as to the subject of the investigation itself by permitting only two "yes" or "no" questions of Abrams.

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[3]Referring to *Giglio v. United States*, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972).

It is most significant to emphasize to this Court, based upon a personal examination of the INS investigative files of various aliens in the instant case, that examination of the files submitted to the trial court *in camera* without any other information or underlying knowledge of what could be important precludes the true import of these files to the defense from being discerned.

In evaluating the conduct of the Government in its deliberate suppression of material critical to the defense, the means undertaken to achieve this result, the compounding of this error by the trial court's foreclosure of meaningful cross-examination in this area, and the unresolved questions as to the Abrams investigation, the language of Justice Fortas in *Brady v. Maryland, supra* at 99-100 is particularly apposite:

> A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim ...
> ... In my view, a supportable conviction requires something more than that the State did not lie. It implies that the prosecution has been fair and honest and that the State has disclosed all information known to it which may have a crucial or important effect on the outcome.

See, also, *United States v. Agurs, supra*, at 113.

In conclusion, the individual petitioners, Shamsher Wadud and Mohinder Singh, who face one of the most grave consequences that can be faced by anyone convicted under our system of criminal justice – deportation from the United States – most respectfully implore this Court to view their petition from the perspective expressed by Justice Harlan in *Chessman v. Teets*, 354 U.S. 156, 165 (1957):

> Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist ... We must be deaf

> to all suggestions that a valid appeal to the Constitution ... comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner, but the Constitution of the United States.

Based upon the foregoing, it is most respectfully urged that the defendants' convictions be reversed or at the minimum that an evidentiary hearing be held.

## Conclusion

For all of the above reasons, it is hereby respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: September 26, 1980

# APPENDICES

**Appendix A**
**Opinion of United States Court of Appeals**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 1013, 1014, 1015, 1016 - September Term, 1979
(Argued: April 17, 1980 Decided: June 12, 1980)
Docket Nos. 79-1439, 79-1440, 79-1484, 79-1485

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79-1439

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

MOHINDER SINGH,
*Defendant-Appellant.*

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79-1440

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

-v.-

SHAMSHER WADUD,
*Defendant-Appellant.*

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*Appendix A*
*Opinion of United States Court of Appeals*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

-v.-

BENGAL CABARET, INC., d/b/a Nirvana Restaurant,
*Defendant-Appellant.*

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79-1485

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

-v.-

BANGLADESH HOUSE, INC.,
d/b/a Nirvana Boutique,
*Defendant-Appellant.*

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Before:

MULLIGAN, *Circuit Judge,*
SPEARS,* and SWEET,** *District Judges.*

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*Honorable Adrian A. Spears, District Judge for the Western District of Texas, sitting by designation.

**Honorable Robert W. Sweet, District Judge for the Southern District of New York, sitting by designation.

*Appendix A*
*Opinion of United States Court of Appeals*

Appeals of judgments of conviction entered after jury trial in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge.*

*Affirmed.*

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ROY R. KULCSAR (Backal, Kulcsar, Labush & Lamendola) New York City, *for appellant* Singh

GERALD M. LABUSH (Backal, Kulcsar, Labush & Lamendola) New York City, *for appellants Wadud, Bengal Cabaret, Inc., and Bangladesh House, Inc.*

ROBERT S. GROBAN, JR., Spec. Asst. U.S. Atty., New York City (Pamela Rogers Chepiga, Mary Jo White, Asst. U.S. Attys., New York City, of counsel), *for appellee.*

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SPEARS, *District Judge*:

This is an appeal by defendants Mohinder Singh, Shamsher Wadud, Bengal Cabaret, Inc. (d/b/a The Nirvana Restaurant), and Bangladesh House, Inc. (d/b/a The Nirvana Boutique) from a judgment of conviction entered in the United States District Court for the Southern District of New York.

The indictment, in seven counts, charged Mohinder Singh, Wadud, and other individuals, as well as the two corporate defendants, each wholly owned by appellant Wadud, with developing and maintaining a sophisticated, broad-based scheme to exploit illegal aliens by

manipulating the United States immigration laws. Count One charged Wadud, the two corporations, Mohinder Singh, and Hud Rabiul Mani Sheikh with conspiring to harbor illegal aliens and to violate federal law by making false statements on various immigration forms and receiving money, services, and other unauthorized benefits from aliens in violation of 18 U.S.C. §§ 1001, 1015, 1422, 1546, and 8 U.S.C. § 1324. Count Two charged Wadud and Bangladesh House with making false statements in connection with an "Application for Status as Permanent Resident" filed with the Immigration and Naturalization Service ("INS") by Prema Kumari Muddan in violation of 18 U.S.C. §§ 1001 and 1002. Count Three charged that Mohinder Singh, Wadud, and Bengal Cabaret aided and abetted Sarbjit Singh in obtaining an immigrant visa through fraud in violation of 18 U.S.C. §§ 1542 and 1546. Counts Four and Five charged Wadud and Bangladesh House with aiding and abetting Shyam Sunder and Jagtar Singh Sehgal in making false statements to INS in connection with their "Applications for Status as Permanent Residents" in violation of 18 U.S.C. §§ 1001 and 1002.

Count Six charged that Wadud and Bengal Cabaret aided and abetted Ahsan Ullah in obtaining an immigrant visa through fraud in violation of 18 U.S.C. §§ 1542 and 1546. Count Seven charged that Wadud and Bengal Cabaret aided and abetted Huq Rabiul Mani Sheikh in making false statements to the United States Department of Labor in connection with Sheikh's "Application for Alien Employment Certification" in violation of 18 U.S.C. §§ 1001 and 1002.

The jury returned guilty verdicts against each of the appellants on all counts of the indictment in which they were named. Ahsan Ullah was acquitted; the case against Sarbjit Singh was severed during trial with the Government's consent. The remaining defendants were not present for trial, and were believed to have returned to their homelands.

*Appendix A*
*Opinion of United States Court of Appeals*

Testimony of Civil Suit Against Defendant

As the first point of error, Wadud and the corporate defendants assert that the district court erred when it allowed the Government to elicit from Miron, one of the prosecution's twenty-four witnesses, that he had brought a civil suit for non-payment of wages which had resulted in an unpaid money judgment against Wadud. The appellants argue that the admission of this testimony destroyed the basic presumption of innocence on the part of the defendant, as set forth in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468, (1978), *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1291, 48 L.Ed.2d 126, (1976), and *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481, (1895). They argue that the effect of the introduction of this evidence, with no immediate curative instruction from the court, was that the jury was left with the impression that what Miron said was more worthy of belief because another court had found Miron worthy of belief. The appellants further argue that the introduction of this evidence was in violation of Rule 404(b) of the Federal Rules of Evidence, which states

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Since the judgment in the state civil suit remained unpaid, Miron had a strong motive to testify in a manner consistent with his testimony in the civil suit. In addition, the mere fact that such a suit had been instituted with the resulting judgment yet unpaid reflected the possibility that Miron bore considerable enmity toward Wadud.

While it is universally accepted that the " . . . enforcement (of the presumption of innocence) lies at the foundation of the administration of our criminal law," *Coffin v. United States*, supra, it should not be implied that the admission of evidence of the bias and self-interest of a witness would destroy the presumption. If anything, the admission here would serve to impeach the credibility of the witness rather than make his testimony more believable. This court has long held that, although credibility generally may not be supported until it has first been attacked, an exception exists which allows the Government to bring out on direct examination the circumstances surrounding a witness' motivation for cooperating with the Government or other matters damaging to the witness' credibility. *United States v. Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States v. Del Purgatorie*, 411 F.2d 84, 87 (2d Cir. 1969); *United States v. Rothman*, 463 F.2d 488, 489-90 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972); *United States v. Di Francesco*, 604 F.2d 769, 775 (2d Cir.), *pet. for cert. granted on other grounds*, ____ U.S. ____, 100 S.Ct. 1012 (1980). Admission of this evidence is permitted in order to avoid an inference by the jury that the Government is attempting to keep from the jury the witness' possible bias.

Furthermore, proper curative instructions were given by the district judge in order to prevent any possibility that the jury might consider the evidence concerning the civil suit on some issue other than Miron's motive in testifying. Although the appellants now complain that the district judge erred in not giving the instructions immediately after the testimony of Miron, the record reflects that they did not seek such an instruction at that time. The point has clearly been waived. See *United States v. Rothman*, supra, in which

this court held that the complete absence of cautionary instructions was not such plain error by the trial judge as to require reversal of the convictions. In the present case, proper instructions were given along with the court's charge to the jury. There is no error on appellant's first point of error.

Evidence of "Other Crimes" and "Bad Acts"

As the second point of error, the two corporate appellants and appellant Wadud contend that the testimony of several witnesses regarding the nonpayment of wages by the defendant and the conditions of their employment constituted inadmissible character evidence of "other crimes" or "bad acts" of Wadud in violation of Rule 404(b) of the Federal Rules of Evidence. Numerous witnesses other than Miron testified concerning the nonpayment of wages to the employees of the Nirvana Restaurant.

T.M. Nazrul Inslam, testified that he worked six or seven days a week from 4:00 p.m. until 1:00 to 4:00 a.m. and that he was paid no salary for his labor, but was allowed to take the tips home. This testimony proceeded with absolutely no objection on behalf of the defendants, although opportunity for objection was obviously present since counsel objected to other portions of the witness' testimony on various grounds, generally as to the form of the questions. At no point did the defense argue that the testimony being admitted constituted evidence of "bad acts" or "other crimes" in violation of Rule 404(b) of the Federal Rules of Evidence.

A.K.M. Omour Faroque Khan testified that he worked at the Nirvana Restaurant from July, 1973, until July 1974. He stated that he worked from 5:00 in the afternoon until 1:00 or 2:00 a.m., but received no salary. Once again, no objection was lodged with the court concerning the evidence elicited from the witness,

although there were objections made throughout this testimony regarding the form of the questions.

Mahboobur Rahman Khan testified that when he was hired by appellant Wadud, he was told that when he had learned the job of waiter, he would be paid the same amount the other waiters received. Although he worked for Wadud from August or September, 1974, until April, 1975, and again from October, 1975, until February, 1977, he testified that he never received any pay. Again, the only objection lodged was to the form of the question. No objection was made to the admission of evidence regarding the nonpayment of wages.

Nur Ahmed testified that he worked at the restaurant for approximately five months, and that he worked approximately sixteen hours a day, but was never paid. This testimony was admitted without any objection of any kind.

Nazmul Ahsan Khan testified that his shift at the restaurant began at 4:00 in the afternoon and lasted until there were no customers left in the restaurant, but that in nine months' time, he received no salary. Although there was a general objection to this line of testimony as being irrelevant, there was no objection on the ground that the testimony constituted "bad acts" or "other crimes" within the meaning of Rule 404(b), Fed.R.Evid.

Rule 12(f) of the Federal Rules of Criminal Procedure clearly states that "Failure by a party to raise ... objections ... shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." This court has strongly held in *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977), that

> ... where a party has shifted his position on appeal and advances arguments available but not pressed below, *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), and where that party has had ample opportunity to make the point in the trial court in a timely manner, *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918, 96 S.Ct. 1122, 47 L.Ed.2d 325 (1976), waiver will bar raising the issue on appeal.

*See also United States v. Viserto*, 596 F.2d 531, 537 (2d Cir.), *cert. denied*, ____ U.S. ____, 100 S.Ct. 80 (1979); *United States v. Fuentes*, 563 F.2d 527, 531 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977); and *United States v. Chiarizio*, 525 F.2d 289, 293 (2d Cir. 1975).

But even if timely objections had been made to questions regarding the nonpayment of wages, such evidence was clearly admissible to prove overt actions taken by the defendants in furtherance of one of the objects of the conspiracy to harbor illegal aliens in Count One of the indictment. The statute alleged to have been violated, 8 U.S.C. § 1324, contains a priviso, "that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." Evidence of extended periods of employment without the receipt of salary was certainly relevant to the issue of whether the employment of these aliens was the usual and normal practice incident to employment.

The Curtailment of Cross-Examination

Appellant Wadud and the two corporate appellants next contend that the court committed reversible error in curtailing their cross-examination of the prosecution's witness.

A trial court is allowed wide discretion in the management of the cross-examination of witnesses. "(I)n the last analysis the trial court is the governor of the trial with the duty to assure its proper conduct and the limits of cross-examination necessarily lie within its discretion. And we should not overrule the exercise of that discretion unless we are convinced that the ruling of the court was prejudicial." *Foster v. United States*, 282 F.2d 222, 224 (10th Cir. 1960), quoted with approval in *United States v. Blackwood*, 456 F.2d 526 (2d. Cir.), *cert. denied*, 409 U.S. 863 (1972). *See also United States v. Cambindo Valencia*, 609 F.2d 603, 630 (2d Cir. 1979); *United States v. Girard*, 601 F.2d 69, 73 (2d Cir.), *cert. denied*, ____ U.S. ____, 100 S.Ct. 148 (1979); *United States v. Glover*, 588 F.2d 876, 878 (2d Cir. 1978); *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976); *United States v. Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975).

In determining whether a trial judge has abused his discretion in the curtailment of cross-examination of government witnesses, the test is whether the jury was already in possession of sufficient information to make a discriminating appraisal of the particular witness' possible motives for testifying falsely in favor of the government. *United States v. James*, 609 F.2d 36, 47 (2d Cir. 1979), *cert. denied*, ____ U.S. ____, 100 S.Ct. 1082 (1980); *United States v. Turcotte*, 515 F.2d 145, 151 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975); and *United States v. Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973) (per curiam). Each of the situations in which the erroneous curtailment is alleged to have occurred must be examined in the light of this test.

The first of these instances occurred during the cross-examination of I.T.M. Nazrul Inslam. Inslam testified that he had worked as a waiter at the Nirvana

Restaurant and had not been paid; that he had observed the co-defendant Mohinder Singh sleep in the restaurant; and that he had never seen the defendant Sarbjit Singh work there. Appellant Wadud and the two corporate appellants contend that the cross-examination of Inslam was improperly curtailed when the court sustained the objection of the Government to the question, "When you were taken into custody, how long did you remain in custody?"

The defense had been allowed a wide latitude in its cross-examination of this witness. It was established that Inslam was living with his friend Mahboobur Rahman Khan ("Mizon"); that Inslam had overstayed his visa; that he was "illegal"; and that deportation proceedings were pending against him. In addition, the INS file of the witness was introduced as a defense exhibit; it classified the witness as a deportable alien who was considered a favorable government witness in this criminal case against Shamsher Wadud. Inslam's illegal status and motive to testify for the Government were amply placed before the jury. The jury had been presented with "sufficient information to make a discriminating appraisal of the witness' possible motives for testifying falsely in favor of the government." *United States v. James*, supra, 609 F.2d 36, 47. The court committed no error in sustaining the objection of the prosecution to the question propounded.

Mahboobur Rahman Khan ("Mizon"), who testified that he had worked at the Nirvana Restaurant without pay, also testified on cross-examination that he and Islam were friends and had worked together at the restaurant. Inslam had previously testified that they lived together. The defense introduced his alien file, which contained his most recent address and which established that Mizon was an illegal alien subject to deportation. The defense was also allowed to elicit from

Mizon that he had an agreement with the Government that he would not be criminally prosecuted for being an illegal alien. The appellants complain that error was committed when the court refused to allow the defense to ask Mizon if he had traveled to and from Bangladesh with Nazrul Inslam. The trial court certainly did not abuse its discretion in refusing to allow the defense to delve into the private lives of the witnesses after it had amply demonstrated the witness' possible bias and motive to testify on behalf of the Government. The name of the person with whom he was living and the name of the person with whom he had traveled from Bangladesh clearly were collateral matters with little, if any, probative value. It was well within the trial judge's discretion to terminate the inquiry. In addition, Inslam had previously testified before the jury that he lived with Mizon, so that the information which the defense says it was unable to elicit was actually placed before the jury.

The reliance of the appellants upon *Smith v Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, (1968) is misplaced. That case states that eliciting the name and address of the witness is essential to cross-examination, and is the very starting point of effective cross-examination. *Id.* at 131. This court notes that the appellants, rather than complaining that they were unable to elicit the name and address of the witness, complain that they were not allowed to show with whom the witness lived and traveled, a far different situation from that in *Smith v. Illinois, supra.*

Nur Ahmed testified as to the terms and conditions of his employment at the Nirvana Restaurant. Unlike the two previous witnesses discussed above, Nur Ahmed had become a citizen, but there was, in his alien file and naturalization documents which had been turned over to the defense, an unsubstantiated notation

of a hearsay allegation that Ahmed had entered into a sham marriage. On cross-examination, defense counsel attempted to impeach Ahmed's credibility with this hearsay allegation of marriage fraud, but the court refused to allow this inquiry. Certainly the trial judge did not abuse his discretion here; indeed, he went well beyond the requirements of Rule 608(b) of the Federal Rules of Evidence which provides:

> Specific instances of the conduct of a witness, for the purposes of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They *may*, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness ... (emphasis added)

Rule 608(b) clearly permits the trial court to exclude completely specific instances of a witness' prior conduct.

While it is possible that an inquiry into whether the individual submitted fraudulent documents to the INS may have, indeed, been probative of the propensity of the witness for truthfulness, the trial judge, as stated in *Foster v. United States, supra*, must set the limits of cross-examination. Here, again, the jury was given sufficient information with which to judge the credibility of the witness. The witness had contradicted himself in his testimony concerning the time when he first arrived in New York, and the defense was able to place before the jury the fact that the witness failed to report two years' employment at the Nirvana Restaurant while in this country as a student in his applications to the INS.

The defense next asserts that its cross-examination was improperly curtailed during the cross-examination of Franklin S. Abrams, an attorney specializing in immigration law who represented several of the aliens who worked at the Nirvana Restaurant. Prior to his being subpoenaed in this case, Abrams had been the subject of an investigation conducted by the INS. The government produced the Abrams files compiled by the INS, and requested that the district judge review them *in camera*, pursuant to 18 U.S.C. § 3500(c). Subsequently, the judge notified all counsel that nothing in the files constituted material which should be turned over to the defense, either under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, or the Jencks Act, 18 U.S.C. § 3500(c). The appellants now contend that these files should be turned over to them.

The trial court's ruling that the files contained neither *Brady* nor § 3500 material cannot be overturned on appeal absent a clear showing of abuse of discretion. *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). This court has carefully examined the files, and concurs with the ruling of the judge of the district court. The matters contained within the files were completely unconnected with the matter at hand. Furthermore, the defense was allowed to place before the jury the fact that the witness had been the subject of investigations by the INS and U.S. Attorney's Office concerning the preparation of labor certifications unrelated to the present case. With this information, the jury was in possession of sufficient information to make a discriminating appraisal of the witness' possible motives for testifying falsely in favor of the Government. No error was committed by refusal of the court to allow examination to extend into the details of collateral matters not connected with the present case.

The final point of error raised by the defendants regarding alleged errors in the control of testimony by the trial court concerns the direct examination of Karim Chand. Dr. Nayamand Naik, a physician who treated Karim Chand, had testified that he had paid the defendant Wadud one thousand dollars to have Wadud sponsor his sister-in-law, Prema Kumari Mudden, as a bilingual secretary so that she would be allowed to remain in the country; he admitted that he had supplied false information on the immigration forms and that, in reality, she had come to the United States to serve as a house servant in his own home. Dr. Naik further testified that he had contacted one of his patients, Karim Chand, to help with Ms. Muddan's immigration. The defendants argue that they were not allowed to elicit from Chand testimony that at a meeting between Chand, Wadud, and Dr. Naik, Chand did not see Dr. Naik give Wadud the one thousand dollars. In actuality, upon a review of the transcript, the only objections sustained were those as to form. Furthermore, the allegedly precluded evidence was in fact in the record, and was argued to the jury by counsel for Wadud. The jury was in possession of the same information which defense alleges it was not allowed to present; there was no error.

In summary, it becomes obvious that the court committed no error regarding the curtailment of cross-examination. In each instance, the jury had before it sufficient facts to weigh and determine the credibility of the witnesses. It would appear that the court properly exercised its discretion; certainly, it was not abused. *See United States v. Blackwood, supra*, and the cases cited following it.

Sufficiency of the Evidence Against Mohinder Singh

The final point of error raised is that of the co-defendant Mohinder Singh, who contends that his guilt was not proven beyond a reasonable doubt, either as to the substantive act of aiding and abetting his brother Sarbjit Singh in the making of false statements in order to obtain an immigrant visa, or as to the conspiracy charged in Count One of the indictment.

In an examination of the evidence to determine whether sufficient proof was adduced for the jury to find beyond a reasonable doubt that a defendant is guilty of an offense, the evidence must be viewed in the light most favorable to the opposing party, crediting all available inferences in favor of the opposing party. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Callabrass*, 607 F.2d 559, 560 (2d Cir. 1979); *United States v. Sprayragen*, 577 F.2d 173 (2d Cir.), *cert. denied*, 439 U.S. 979 (1978); *United States v. Ruffin*, 575 F.2d 346, 353 (2d Cir. 1978); *United States v. Lamont*, 565 F.2d 212, 216 (2d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *United States v. Daley*, 564 F.2d 645, 650 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). Furthermore, all issues of credibility must be considered questions solely within the jury's province. *United States v. Sprayragen, supra*, 577 F.2d at 174, *United States v. Lamont, supra*, 565 F.2d at 216, *United States v. Taylor*, 464 F.2d 240, 245 (2d Cir. 1972). When judged by these standards, the defendant's claim that the jury lacked sufficient evidence to determine his guilt as to either count beyond a reasonable doubt is clearly without merit.

As to Count Three, which charged Mohinder Singh with aiding and abetting the making of false statements in the visa application of his brother Sarbjit Singh, the evidence established that Mohinder Singh

prepared the way for and assisted Sarbjit Singh in obtaining a labor certification as a specialty chef at the Restaurant. That labor certification as a specialty chef was completed, filed, and approved by the Labor Department while Sarbjit Singh was still in India. Mohinder Singh went to the offices of Franklin Abrams, the immigration lawyer, where he had the appropriate forms prepared for his brother and Wadud, when he knew that his brother was not a specialty chef. When the labor certification was approved, it was sent to India where Sarbjit Singh presented it to the American Consulate, and, based upon the fraudulent statements therein, Sarbjit Singh was issued an immigrant visa.

When Sarbjit Singh arrived in the United States, he did not work as a specialty chef, nor did he have any job at the Nirvana Restaurant, as represented to the Labor Department. Instead, Mohinder Singh approached Victor Khubani, and asked him to employ his brother Sarbjit as a doorman. Salary checks, bank records, and the testimony of several of Khubani's employees established that Sarbjit Singh was employed at the Tandoor, Khubani's restaurant, at hours which made it impossible for him to have been employed at the same time as a specialty chef at the Restaurant.

Accordingly, the evidence as to the substantive count was certainly sufficient to prove that Mohinder Singh had knowingly and wilfully aided and abetted the making of false statements in Sarbjit Singh's visa application. Needless to say, this same evidence of the substantive count is admissible and relevant as evidence of an overt act in furtherance of the conspiracy.

Evidence was offered to prove that Mohinder Singh had paid Wadud one thousand dollars for his own fraudulent certification as a specialty chef. Further

evidence of Mohinder Singh's participation in the conspiracy was offered by the testimony of Bachan, the Restaurant's dishwasher, who was also sponsored by Wadud as a specialty chef. When testifying before the Grand Jury, Bachan stated that he had been introduced to Wadud by Mohinder Singh, but he changed his testimony at trial and was impeached by his prior Grand Jury testimony.

The jury was entitled to find that Mohinder Singh had played a central role in obtaining his own fraudulent "specialty chef" labor certification through the Restaurant, as well as that of his brother and Bachan. Evidence was presented that Mohinder Singh visited Franklin Abrams about once a month in connection with labor certifications being funneled through Wadud's various corporations. Because of his presence at the Restaurant, he could clearly see that the people to whom the labor certifications were issued as specialty chefs were actually employed as waiters, doormen and dishwashers. Thus, the evidence is more than sufficient for the jury to find that Mohinder Singh knowingly and wilfully joined the conspiracy, was aware of its objects, and promoted its goals. *United States v. Callabrass, supra*, 607 F.2d at 560; *United States v. Sprayragen, supra*, 577 F.2d at 173; *United States v. Ruffin, supra*, 575 F.2d at 353.

Mohinder Singh next contends that he was convicted by "prejudicial spillover" because of the vast amount of evidence presented against Wadud, and that he was convicted "not on the basis of the evidence relating to (him), but by imputing to (him) guilt based on the activities of the other ... conspirators." *United States v. Toliver*, 541 F.2d 958, 962-3 (2d Cir. 1976). In light of the preceding discussion of the sufficiency of the evidence against Mohinder Singh, this argument is

without merit as is his unsupported assertion raised for the first time on appeal that the proof showed multiple conspiracies and that a single-multiple conspiracy charge was not given.

Accordingly, the judgment of the district court is affirmed.

## Appendix B
## Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of August, one thousand nine hundred and eighty.

Present: HONORABLE WILLIAM H. MULLIGAN
Circuit Judge

HONORABLE ADRIAN A. SPEARS

HONORABLE ROBERT W. SWEET
District Judges

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

MOHINDER SINGH, SHAMSHER WADUD, BENGAL CABARET, INC., d/b/a NIRVANA RESTAURANT and BANGLADESH HOUSE, INC., d/b/a NIRVANA BOUTIQUE,
*Defendants-Appellants.*

79-1439, 79-1440, 79-1484, 79-1485

A petition for a rehearing having been filed herein by counsel for the Appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ _____
A. DANIEL FUSARO
Clerk

*Appendix B*
*Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of August, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

MOHINDER SINGH, SHAMSHER WADUD, BENGAL CABARET, INC., d/b/a NIRVANA RESTAURANT and BANGLADESH HOUSE, INC., d/b/a NIRVANA BOUTIQUE,
*Defendants-Appellants.*

79-1439, 79-1440, 79-1484, 79-1485

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/_____
WILFRED FEINBERG
Chief Judge

## Appendix C
## Constitutional and Statutory Provisions Involved in the Case

### CONSTITUTION OF THE UNITED STATES

### FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Appendix C*
*Constitutional and Statutory Provisions*
*Involved in the Case*

## STATUTORY PROVISIONS

28 U.S.C. § 1254(1)

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

No. 80-510

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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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MOHINDER SINGH, ET AL.

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether the district court erred in permitting the government to elicit from one of its witnesses on direct examination the fact that the witness had an outstanding unpaid civil judgment against petitioner Wadud for nonpayment of wages.

2. Whether the district court erred in declining to order production of materials relating to a federal investigation of a government witness and in limiting petitioners' cross-examination on that subject.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 12, 1980, and petitions for rehearing were denied on August 1, 1980 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring, in violation of 18 U.S.C. 371, to induce illegal entry into the United States and to harbor illegal aliens in violation of 8 U.S.C. 1324, to make false statements to the Immigration and Naturalization Service (INS), the Department of State, and the Department of Labor in violation of 18 U.S.C. 1001 and 1015, to demand and receive fees unauthorized by law in proceedings relating to the registration of aliens in violation of 18 U.S.C. 1422, and to procure entry documents by fraud in violation of 18 U.S.C. 1546 (A. 10-15, 2016).[1] Petitioners were also convicted of various substantive offenses growing out of the conspiracy. Petitioner Wadud was convicted on four counts of aiding and abetting the making of false statements to the

[1] "A" refers to the joint appendix filed in the court of appeals.

INS or the Department of Labor, in violation of 18 U.S.C 1001, and one count of aiding and abetting the obtaining of an immigrant visa through fraud, in violation of 18 U.S.C. 1546; petitioner Bangladesh House was convicted on two Section 1001 counts; petitioner Bengal Cabaret was convicted on one Section 1001 and the Section 1546 count; and petitioner Mohinder Singh was convicted on the Section 1546 count (A. 15-18, 2016-2017). Petitioners Wadud and Bengal Cabaret were also convicted of a second Section 1546 aiding and abetting violation, but the count was dismissed because the defendant named as principal was acquitted (A. 17, 2016-2018).

Petitioner Wadud was sentenced to concurrent 15-month terms of imprisonment on the six counts upon which he was convicted (A. 2049). Petitioners Bengal Cabaret, Inc., and Bangladesh House, Inc. were fined $10,000 and $2,000 respectively (A. 19). Petitioner Mohinder Singh was given suspended sentences of one year's imprisonment on the two counts upon which he was convicted and was placed on probation for two years or until deported (A. 2051). The court of appeals affirmed (Pet. App. 1a-19a).

The evidence showed that petitioner Wadud, assisted by petitioner Mohinder Singh and others [2] and acting through the two corporate petitioners, operated a scheme to exploit illegal aliens from Bangladesh by employing them for long hours at virtually

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[2] The indictment also named Huq Rabiul Mani Sheikh in the conspiracy count and as a principal in one of the substantive counts, and Shyam Sunder, Jagtar Singh Sehgal and Sarbjit Singh as principals in other substantive counts (A. 16-18). Sheikh, Sunder, and Sehgal had not been apprehended at the time of trial; Sarbjit Singh was severed during trial, and subsequently a nolle prosequi was filed with respect to the charges against him.

no wages at the Nirvana Restaurant, which was owned and operated by a corporation, petitioner Bengal Cabaret. The scheme involved obtaining fraudulent entry documents and fraudulent permanent resident status for the aliens in exchange for both monetary fees and their agreement to work under substandard conditions.

## ARGUMENT

1. Petitioners contend (Pet. 9-14) that the district court erred in permitting the government, on direct examination of its witness Nizamuddowlah, to elicit the fact that he had secured a civil judgment against petitioner Wadud for nonpayment of wages and that the judgment was as yet unpaid. This argument, which rests in part on record quotations characterized by significant omissions, is without merit.

a. One of the exploited aliens who testified as a government witness was Saleh Nizamuddowlah (also known as Miron). Nizamuddowlah had successfully sued Wadud in state court for nonpayment of wages but had not as yet collected on his judgment. At a pretrial hearing, Wadud's counsel stated that the civil litigation "is certainly relevant when it comes to credibility of witnesses and certainly going to be relevant in terms of cross-examination" (H. Tr. 28).[3] The court agreed that "the fact of their being on opposite sides of one another and involved in litigation may be relevant," but it added that "any *exhaustive* analysis or inquiry concerning the case is not" (*ibid.*; emphasis added). Petitioner Wadud's attorney agreed, but said he did not think "it can be totally

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[3] "H. Tr." refers to the transcript of the pretrial hearing held on September 18, 1979.

excluded" (*ibid.*). The court then indicated that there was no objection to "bring[ing] out on cross-examination that a particular witness had a basis for bias because he was suing somebody else" in another court, but that the prosecutor's concern was "that you might try to relitigate those issues here, and I can assure you that you are not going to be able to do that" (H. Tr. 28-29).

On direct examination of Nizamuddowlah at trial, the government brought out the fact of the civil suit and the unpaid judgment. The court, over Wadud's trial objection, allowed the testimony as relevant "to motive" (A. 337-338). In its final instructions, the court told the jurors that testimony concerning the civil suit had been admitted "solely on the issue of whether the witness Nizamuddowlah had another motive to testify in this action" and that they could "only consider the results of that case in this context, and that is in terms of assessing Nizamuddowlah's credibility" (A. 2000).[4]

b. Petitioner Wadud's attorney thus put the government on notice at the pretrial hearing that the civil case was likely to be used in cross-examination to attack witness credibility, and the court properly approved such a proposed line of questioning to show witness bias (see *Villaroman* v. *United States*, 184 F.2d 261, 262 (D.C. Cir. 1950)), limiting petitioner only as to any "exhaustive analysis or inquiry" into the litigation that would amount to "relitiga[tion]" of "those issues" (H. Tr. 28-29; compare Pet. 10).

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[4] Petitioners' quotation (Pet. 11) from the court's instruction omits the court's explanation that the evidence was admitted only for its relevance to Nizamuddowlah's motive for testifying.

It was therefore open to the government to attempt to defuse the argument by anticipating petitioners' cross-examination questions. *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), cert. granted on another issue, No. 79-567 (Feb. 19, 1980) (argued Oct. 6, 1980), decision pending; see also *United States* v. *Partin*, 552 F.2d 621, 644-645 (5th Cir.), cert. denied, 434 U.S. 903 (1977). Since the fact that petitioner Wadud had not paid the judgment might be seen as contributing to the witness's bias, it was not, as petitioners suggest (Pet. 11-14), error for the court to allow the government to elicit the fact that there was an outstanding unpaid judgment as well as the fact that the suit had been brought.

*United States* v. *Konovsky*, 202 F.2d 721 (7th Cir. 1953), on which petitioners rely (Pet. 9, 12-13), is not to the contrary. That case involved the introduction of a civil injunction prohibiting one of the defendants from committing the precise act (acting in concert with others to prevent a black citizen from entering his property) that was the essence of the criminal offense with which he was charged. At the government's request, the court instructed the jury to consider the injunctive order "not as proof" of the criminal violation charged but "as a circumstance in the light of which the conduct of the defendants should be 'evaluated'." 202 F.2d at 726. In the present case, by contrast, the unpaid judgment for nonpayment of wages concerned a fact relevant to the offense charged but did not evidence conduct equivalent to the offense itself; the court's instruction strictly limited jury consideration of the testimony to its relevance to the witness's possible bias; and the testimony was invited by the defense suggestion that the evidence would be brought out on cross-examination.

2. Petitioners also contend (Pet. 14-21) that the district court erroneously condoned government suppression of materials relating to a federal investigation of government witness Franklin S. Abrams for falsification of labor certifications not involved in this case and that it erroneously curtailed petitioners' cross-examination of Abrams on this subject. Both claims are groundless.

a. Franklin S. Abrams is an immigration attorney who represented several of the aliens in obtaining labor certifications. He testified that he had obtained the information (elsewhere shown to be false) used in applying for the certifications from petitioners Wadud and Mohinder Singh (A. 943-960, 964-966). Prior to Abrams' appearance as a witness, the government informed the court ex parte in chambers that Abrams had been the subject of an unrelated labor certification fraud investigation as to which prosecution was declined; the investigative files pertaining to that case were turned over to the court for an in camera determination concerning whether production to petitioners was required (A. 400-401). Subsequently, in the presence of defense counsel, the government reiterated its request for a determination whether the material was producible to petitioners under either 18 U.S.C. 3500 or *Brady* v. *Maryland*, 373 U.S. 83 (1963) (A. 841-844).

After reviewing the materials overnight, the court ruled that production was not required on either basis (A. 852). The court also initially refused to permit Wadud's counsel to question Abrams on cross-examination about the investigation (A. 969). Thereafter it reversed itself and permitted counsel to inquire whether Abrams was the subject of an investigation by Immigration authorities or an inquiry by

the United States Attorney's office (A. 971-972). Counsel was forbidden to go into details but was allowed to inquire "whether pressure or threats of any kind were involved" (A. 972-973). Counsel, however, inquired only whether Abrams was the subject of an investigation and not whether the investigation involved pressure or threats (A. 973).

b. Contrary to petitioners' repeated assertions (Pet. 15, 19, 20), the government did not "deliberately suppress" the information pertaining to the investigation of Abrams. Rather, the government followed the procedure recommended in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), of turning the material over to the court for its determination whether production to the defense was required. Both that court and the court of appeals—which "carefully examined the files" (see Pet. App. 14a)—concluded that production was not required. There is no occasion for this court to afford further review of this question.

c. The court of appeals was also correct in upholding the trial court's refusal "to allow examination to extend into the details of collateral matters not connected with the present case" (Pet. App. 14a). Credibility may be attacked only on the basis of a prior conviction, not a mere investigation. See Rule 609, Fed. R. Evid. The only relevance of the unrelated investigation of Abrams, therefore, was that it might have been used to pressure him into giving the testimony that he gave. The trial court extended to petitioners an opportunity to inquire about this, but petitioners declined to avail themselves of the opportunity.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1980

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